

The Honorable Ricardo S. Martinez

UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

ROBERT and TANYA WILLIAMS, *et al.*

Plaintiffs,

V.

UNITED STATES OF AMERICA,

Defendant.

CASE NO. 2:18-cv-01837-RSM

UNITED STATES' RESPONSE TO
PLAINTIFFS' MOTION FOR
CONTINUANCE OF TRIAL DATE
AND DISCOVERY DEADLINES

I. INTRODUCTION

19 COMES NOW Defendant, United States of America, by and through its counsel,
20 Tricia Boerger, in response to Plaintiffs' Motion for Continuance of Trial Date and
21 Discovery Deadlines. The United States recognizes the gravity of Kevin Sullivan's
22 circumstances set forth in Plaintiffs' motion and does not intend to be insensitive to the
23 request. However, the proposed continuance of the trial and discovery deadlines by six
24 months will not adequately address the concerns or time constraints set forth in Plaintiffs'
25 motion. The United States conveyed this concern and requested an alternative timeline
26 that would allow for the timely completion of discovery, including necessary independent
27 medical examinations ("IMEs") pursuant to Federal Rule of Civil Procedure 35, but did
28 not receive a response. Therefore, the United States opposes Plaintiffs' motion and

1 requests a definite and appropriate timeline for completion of discovery under the
 2 circumstances.

3 **II. FACTUAL BACKGROUND**

4 The Court has been provided with the correspondence between the parties
 5 regarding the scheduling of Rule 35 IMEs for all four plaintiffs and it is incorporated
 6 herein by reference. *See* Dkt. No. 22-1, pp. 2-9. As detailed in the correspondence, the
 7 United States worked closely with its experts and attempted to work with opposing
 8 counsel to schedule IMEs and depositions in close temporal proximity to each other in
 9 consideration of Plaintiffs' need to travel to Seattle from Virginia. *Id.* at p. 9. The United
 10 States indicated its concern that Plaintiffs' proposed timing for the IMEs and depositions
 11 over the holidays was after the existing expert disclosure deadline of November 20, 2019
 12 and too near the discovery cutoff of January 21, 2020 to allow adequate time to complete
 13 discovery. *Id.* at p. 7. It was only after additional attempts to obtain agreed-upon timing
 14 for the IMEs and depositions, including a five-day extension of a deadline for a response,
 15 that the United States learned of Virginia counsel's impending family leave and
 16 subsequently, one local counsel's medical leave. *Id.* at pp. 4-7.

17 **III. ARGUMENT**

18 While the United States recognizes and is sympathetic to the difficult
 19 circumstances for local counsel and Plaintiffs, the proposed six-month continuance does
 20 not adequately address the circumstances of school schedules and extended medical or
 21 family leave.

22 The United States has noted the IMEs of the four plaintiffs to occur at three
 23 separate doctors' offices in the Seattle and Tacoma area between November 13-15, 2019.
 24 Declaration of Tricia Boerger ("Boerger Decl.") attached hereto at ¶ 2. The United States
 25 has worked to coordinate the timing of the IMEs to occur in close temporal proximity to
 26 each other, including requesting two psychological evaluations in one day by one doctor,
 27 which is atypical. *Id.* at ¶ 3. The doctors have been holding proposed dates open while the
 28 timing was discussed with Plaintiffs. *Id.* at ¶ 4. The United States initially offered

1 possible dates over three different weeks from late October to early November. Dkt. No.
 2 22-1, p. 9. These experts need to conduct the IMEs in order to complete their reports in
 3 this matter. Boerger Decl. at ¶ 5. Given the existing case schedule deadline for expert
 4 disclosures of November 20, 2019, the United States has now noted these IMEs to occur
 5 as late as possible to accommodate Plaintiffs. *Id.* at ¶ 6.

6 The United States appreciates the importance of Virginia counsel taking family
 7 leave after the birth of her child. However, her absence does not necessarily dictate a
 8 continuance. *See e.g. Ball v. Manalto, Inc.*, 2017 WL 2119329 (W.D. Wa May 16, 2017).
 9 Virginia counsel works for a large law firm, Allen, Allen, Allen & Allen that purports to
 10 have 37 attorneys in two offices. Boerger Decl. at ¶ 7; see also
 11 <https://www.allenandallen.com/attorneys/>. It is likely there are attorneys from her firm
 12 who will be monitoring her cases in her absence and can assist Plaintiffs during her
 13 family leave, if necessary. While Kevin Sullivan is unavailable, Patrick Sullivan is
 14 available, albeit during a difficult time.

15 Further, IMEs do not require the presence of attorneys and indeed, the presence of
 16 third parties is recognized as intrusive and can have a detrimental impact on the validity
 17 of the examinations, particularly for psychological evaluations. *See generally Hertenstein*
 18 *v. Kimberly Home Health Care, Inc.*, 189 F.R.D. 620, 630 (D.Kan.1999) (noting, *inter*
 19 *alia*, risk to integrity of examination and its results); *Tomlin v. Holecek*, 150 F.R.D. 628,
 20 631-33 (D.Minn.1993). Scholarly comment also supports exclusion of attorneys and
 21 recording devices from IMEs due to the likelihood of adverse effects on an examination.
 22 W. Wyatt & R. Bates, *The Presence of Third Parties at Rule 35 Examinations*, 71 Temp.
 23 L. Rev. 103, 127-129 (1998).

24 Plaintiffs have expressed concern that travel to Seattle would be disruptive to
 25 Makenzie Williams and M.W. #2's educational schedules. However, they have not
 26 proposed a time for IMEs or depositions that would work for their school schedules or
 27 the remaining conflicts identified in Plaintiffs' motion. A six-month continuance would
 28 most likely result in an expert disclosure deadline in May 2020, and it is not evident, or

1 likely, that Miss Williams and M.W. #2 would be out of school sufficiently prior to that
 2 deadline to allow IMEs to occur before the expert disclosure deadline. Setting IMEs over
 3 the holidays is not ideal, as the United States' experts need three days to conduct the
 4 IMEs and the holidays fall on a Wednesday this year. This suggestion also fails to
 5 address Plaintiffs' concern that Virginia counsel be available to Plaintiffs, as her
 6 maternity leave is expected to last several months from November 2019 until
 7 approximately March 2020. It is also unknown whether local counsel's medical leave
 8 will continue through the holiday period, as counsel indicated a possible return to work in
 9 January 2020. Therefore, a holiday schedule does not appear feasible for the IMEs in this
 10 case. However, as the United States indicated in its correspondence, the Plaintiffs'
 11 depositions could be conducted during this time. Dkt. No. 22-1, p. 2.

12 Whether under the current case schedule or Plaintiffs' proposed six-month
 13 continuance, Plaintiffs' school schedules will likely have to be briefly disrupted for
 14 purposes of litigating this case. The United States requests it be permitted to maintain the
 15 dates its doctors have been holding for over a month, November 13-15, 2019, and that the
 16 IMEs proceed as scheduled. Virginia counsel is still available, as is local counsel Patrick
 17 Sullivan, and attorneys are not required to be present, nor should they be permitted, at
 18 IMEs. In the alternative, the United States requests that the Court identify a deadline for
 19 IMEs at least 30 days prior to the expert disclosure deadline in any extended case
 20 schedule.

21 If the Court is inclined to grant a continuance, the United States requests that the
 22 continuance provide for adequate time to conduct discovery in this case. Under the
 23 circumstances, a six-month continuance is not likely to be sufficient to allow for that.
 24 Three sets of discovery were propounded on Plaintiffs in September and are currently
 25 overdue. Boerger Decl. at ¶ 8. The United States needs a response to this discovery and it
 26 is possible, even likely, that additional discovery will be propounded. If both local
 27 counsel and Virginia counsel are unavailable for several months, the United States'
 28 ability to conduct and receive discovery in the interim will be impacted. Plaintiffs argue

1 that they should not be deprived of the full strength of their representation, including
2 Virginia counsel, but if she is deemed necessary and will be on leave until approximately
3 March 2020, the United States will require sufficient time to receive discovery responses,
4 propound additional discovery, and conduct depositions following her return. As with
5 Plaintiffs' school schedules, an expert disclosure deadline in May 2020 is not sufficient
6 for this purpose.

7 **IV. CONCLUSION**

8 For the reasons stated, the United States' objects to a six-month continuance in
9 this case and requests that it be permitted to conduct IMEs of the four plaintiffs as
10 scheduled from November 13-15, 2019. If the Court is inclined to grant a continuance,
11 the United States requests the Court set a definite and appropriate timeline for discovery
12 in light of all of the circumstances in this case.

13 DATED this 23rd day of October, 2019.

14 Respectfully submitted,

15 BRIAN T. MORAN
16 United States Attorney

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that she is an employee in the Office of the United States Attorney for the Western District of Washington and is a person of such age and discretion as to be competent to serve papers.

It is further certified that on October 23, 2019, I electronically filed said pleading with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the following CM/ECF participant(s):

Kevin P. Sullivan k.sullivan@sullivanlawfirm.org
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I further certify that on October 23, 2019, I mailed by United States Postal Service said pleading to the following non-CM/ECF participant(s)/CM/ECF participant(s), addressed as follows:

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Dated this 17th day of April, 2019.

/s/ Julene Delo
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